08-99007

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONSTANTINO CARRERA, Petitioner and Appellant, vs. ROBERT L. AYERS, JR. Warden, Respondent and Appellee.	)	**PETITION FOR REHEARING AND/OR REHEARING EN BANC**

Appeal from the Judgment
of the Eastern District of California (Fresno)
Anthony Ishii, Judge
Case no. 1:90-cv-00478 AWI

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PETITION FOR REHEARING (EN BANC)

Petitioner and Appellant Carrera respectfully petitions for rehearing and/or rehearing en banc, after the panel voted 2-1 to deny habeas corpus relief, with Judges Bea and O'Scannlain in the majority, and Judge Tashima dissenting. (opinion, October 4, 2011, Appendix A.)

The main issues in this capital case are (1) whether defense counsel rendered ineffective assistance (IAC) in failing to object to racial discrimination in jury selection, after the prosecutor peremptorily challenged 75% (six of eight) Hispanic jurors, but only challenged 27% of the white jurors, in a case with a Hispanic defendant and white victims; (2) whether an appellate court may speculate on reasons for a prosecutor's challenges to minority jurors; and (3) whether the IAC constituted structural error, which was prejudicial *per se*.

The majority implicitly acknowledged defense counsel could render IAC by failing to object to discrimination in jury selection. However, in refusing to find IAC here, the majority repeatedly and improperly speculated on possible reasons for the prosecutor's challenges, and on possible reasons for defense counsel's inaction. Such speculation is prohibited. Johnson v. California, 545 U.S. 162, 173 (2005). Further, the majority opinion drastically re-wrote the rules in this Circuit on how to examine jury selection under Batson v. Kentucky (1986) 476 U.S. 79. If this opinion is allowed to stand, (1) every challenge to racial discrimination under Batson will be substantially curtailed, and (2) no one will ever establish IAC for failure to make a Batson motion.

Consideration en banc is warranted under Circuit Rule 35-1. The majority opinion conflicts with over 10 of this Court's opinions. It conflicts with several Supreme Court opinions. Racial discrimination in jury selection violates the Constitution.

I.

DEFENSE COUNSEL RENDERED IAC BY FAILING TO OBJECT TO RACIAL DISCRIMINATION IN JURY SELECTION

A. The Dissent Got it Right

Judge Tashima, in dissent, would have reversed and granted habeas relief. He correctly opined as follows:

1. There was an "obvious" *prima facie* case of racial discrimination in jury selection in violation of People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748 (1978). Wheeler was the law when this case was tried. Wheeler is California's precursor to Batson. The prosecutor struck 75% (six of eight) Hispanic jurors, but only 27% of the potential white jurors, in a case with a Hispanic defendant and white victims. Such "highly disproportionate" challenges established a *prima facie* case. (dissent, 18732-18733) Accord: Williams v. Runnels, 432 F.3d 1102, 1105 (9th Cir. 2006) (*prima facie* Wheeler/Batson case where 3 of 4 minority jurors are struck); Fernandez v. Roe, 286 F.3d 1073, 1078 (9th Cir. 2002) (4 of 7).[1]

2. There was no evidence that defense counsel had any strategic reason not to object to the prosecutor's discriminatory challenges. Defense counsel "has never articulated a strategic reason for failing to make a Wheeler motion." (dissent, 18737) Counsel signed two declarations, one for the prosecution and one for the defense. She declared she did not remember any reason for not objecting. (ER:III:766-767) Thus, there is no evidence that counsel had any "strategy" at all, let alone the "sound trial strategy" the majority postulates, for

[1]Review is *de novo*. As the majority acknowledged, no deference is owed to the state court under AEDPA, because this appeal was filed before AEDPA was adopted. (maj. op., 18715)

her failure to object. (dissent,18733)[2]

3. Defense counsel rendered IAC by failing to contend that peremptory challenges to six out of eight Hispanic jurors presented a *prima facie* Batson violation. Strickland v. Washington, 466 U.S. 668 (1984). (dissent, 18733)

4. Counsel's failure to make any record of the dismissal of Hispanic jurors was itself deficient performance. Under California law, People v. Wheeler, supra at 764, upon which Batson relied (476 U.S. at 92, n. 17), a party who suspects his opponent is striking potential jurors for group bias "should make as complete a record of the circumstances as is feasible." (dissent, 18734, n. 3)

5. In post-trial proceedings, the prosecutor declared he could not recall or reconstruct his reasons for striking most of the Hispanic jurors. This raises a reasonable inference that there was no reason, other than group bias, to challenge them. (dissent, 18734, n. 2) The prosecutor's inability to recall or reconstruct any race-neutral reasons constitutes further evidence of discrimination. Johnson v. California, 545 U.S. at 171, n. 6.

The prosecutor claimed his files lacked notes regarding jury selection. However, jury selection lasted 10 days, for over 100 potential jurors. The only reasonable inference is that the prosecutor took notes, but destroyed them later. See Gonzales v. Brown, 585 F.3d 1202, 1209, fn. 5 (9th Cir. 2009).

The prosecutor had the responsibility to maintain his records. He cannot deprive Appellant of his right to non-discriminatory jury selection by destroying his notes. "[T]he defendant may not be penalized for the state's

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[2]Defense counsel did not remember why she did not make a Wheeler/Batson motion. She declared, "I don't know why at this time." (ER:III:766-767) The majority claims from the wording "at this time" that counsel once had a reason, but forgot it. (maj. op., 18730, n. 17) This claim is pure speculation.

failure to articulate its reasons due to the passage of time." Paulino v. Harrison (Paulino II) 542 F.3d 692, 703 (9th Cir. 2008).

6. The dissent finds the majority opinion defective for speculating on possible reasons for challenges, searching "for snippets in the voir dire transcript to justify that which, *prima facie*, appears motivated by bias." (dissent, 18735) Such speculation is prohibited. Under Johnson v. California, 545 U.S. at 172, it is improper to rely "on judicial speculation to resolve possible claims of discrimination." A court may only rely upon reasons the prosecutor actually gave, not on those he might have given. Paulino v. Castro (Paulino I), 371 F.3d 1083, 1090 (9th Cir. 2004).

7. When there is a *prima facie* Batson case, and when the prosecutor fails to provide a credible, race-neutral reason for challenging even one single juror, a Batson violation occurs. (dissent, 18736) People v. Wheeler, 583 P.2d at 765; Snyder v. Louisiana, 552 U.S. 472 (2008).

8. The record does not support the majority's finding of race-neutral reasons for all six Hispanic jurors, and that such reasons were "so obvious or apparent" as to excuse trial counsel from making a Wheeler/Batson motion. (dissent, 18736)

9. Even when the majority speculated on possible reasons, it admitted there were none on the record for juror Martinez. He was similarly situated with seated white juror Allen. Each had a 30-mile drive to the courthouse. The majority speculated the prosecutor challenged Martinez because he was too disabled to serve, although there was no evidence on the record of his actual disability, and although he was passed for cause, and stated he could serve. Such speculation is prohibited. Johnson v. California. Further, it has "been well established for many years that the law forbids discriminating against the

disabled in jury service. See, e.g., Greater L.A. Council on Deafness, Inc. v. Zolin, 812 F.2d 1103 (9th Cir. 1985)." (dissent, 18737, n. 6)

10. The majority speculated, without evidence, that defense counsel "may have been pleased" by the jury. However, defense counsel said no such thing. She did not remember why she failed to make a Wheeler/Batson motion. Further, the question under Strickland is "whether a reasonable attorney in the same circumstances would have objected." Any reasonable attorney would have objected here. (dissent, 18734, fn. 3; 18735) Accordingly, the failure to make a Wheeler/Batson motion constituted deficient performance.

11. Because a Wheeler/Batson error is structural error, IAC allowing a Wheeler/Batson violation is also structural error, which is prejudicial *per se*. Thus, habeas relief is warranted. (dissent,18740)

B. The Majority Got it Wrong

(1) The majority incorrectly refused to apply Batson

The majority (Judge Bea, with Judge O'Scannlain) refused to apply Batson, on the supposed theory that Batson "does not apply retroactively in federal habeas review . . ." (maj. op., 18717) The majority cites Allen v. Hardy, 478 U.S. 255, 260 (1986) for this proposition. The majority is mistaken. Neither Allen v. Hardy, nor any other case, so holds. The 1986 Batson decision is fully retroactive to all cases - - both direct appeal and habeas - - which were not final on direct appeal when Batson was decided. Griffith v. Kentucky, 479 U.S. 314, 328 (1987); Miller-El v. Dretke, 545 U.S. 231 (2005) (Batson applied to habeas case where trial occurred pre-Batson but direct appeal was not final until after Batson.) This case was not decided on direct appeal until 1989. Accordingly, the 1986 Batson decision is fully retroactive.

In Allen v. Hardy the Supreme Court refused to apply Batson on habeas only because the direct appeal was final before Batson was decided. (id., 478 U.S. at 258.) That was the same rule articulated in Griffith v. Kentucky. Thus, nothing in Allen v. Hardy bars reliance upon Batson on federal habeas, as long as the direct appeal was not final by 1986.

(2) The majority's acceptance of the prosecutor's boiler plate claim, that he did not discriminate, violated Batson's requirement that specific reasons be given for challenges to jurors

(a) The majority thrice trumpeted the prosecutor's declaration that he could not remember his specific reasons for his peremptory challenges, but he was certain he did not challenge on racial grounds. (maj. op., 18720, n. 12; 18726, 18730, n. 16) Reliance on this assertion violated Batson. It explicitly holds the prosecutor may not "rebut the defendant's case merely by denying that

he had a discriminatory motive . . .” Batson, 476 U.S. at 97.

(b) The majority ignored clear evidence of the prosecutor’s racial animus: After defense counsel moved, before voir dire, to ensure a representative number of Hispanics in the venire, the court ruled: “I think there is a fair representation on this panel.” Defense counsel said, “Yes, I counted, . . . I came up with ten Hispanics.” The prosecutor responded: “For the record, I am objecting to a presentation like an affirmative action on the panel.” (ER:III:830) The prosecutor’s comment, expressing hostility toward equal protection rights of minority jurors, showed racial animus. Kesser v. Cambra, 465 F.3d 351, 360 (9th Cir. 2006, en banc) (the “totality of the relevant facts” on a Batson motion “includes the prosecutor’s statements about his jury selection strategies . . .”).

(c) Finally, the majority overlooked the district court’s reversal of both death penalty and special circumstances, because the prosecutor knowingly presented perjurious testimony from two jailhouse informants, and because the prosecutor personally lied to the trial court and the jury when he falsely declared the informants were not receiving benefits for their testimony. (ER:I:29; 217-250) The district court’s multiple findings of prosecution misconduct, from which Respondent did not appeal, sharply undercut the prosecutor’s supposed credibility.

(3) The majority opinion is improperly based on nothing but speculation

In affirming the denial of habeas relief, the majority acknowledged the district court’s reasoning was largely defective. (maj. op., 18714, n. 2) Nonetheless, the majority affirmed by repeatedly speculating on possible reasons for the prosecutor’s challenges to Hispanic jurors, and possible reasons for defense counsel’s inaction. Such speculation is not allowed. Johnson v.

California.

The majority turned the Batson test on its head by hypothesizing that *any possible reason* which could be vaguely inferred for a prosecutor's challenge, or for defense counsel's inaction, was sufficient to defeat an IAC/Wheeler claim. However, a court may not conjure rationales that were not counsel's actual reasons. See Wiggins v. Smith, 539 U.S. 510, 526-27 (2003) (*"post hoc* rationalization of counsel's conduct" cannot justify failure to investigate; court must rely on "an accurate description of [counsel's] deliberations prior to sentencing."); Alcala v. Woodford, 334 F.3d 862, 871 (9th Cir. 2003) ("We will not assume facts not in the record in order to manufacture a reasonable strategic decision for trial counsel.")

Johnson v. California, 545 U.S. at 172, and Paulino v. Harrison (Paulino II), 542 F.3d, 692, 699 (9th Cir. 2008) explicitly prohibit a court from speculating on possible reasons for challenges to jurors, when the prosecutor does not state reasons. Instead, a court may only rely upon reasons which the prosecutor actually gave, not upon possible reasons which he might have given. As this Court held in Paulino I, 371 F.3d at 1090, "[I]t does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the real reason . . . from the prosecutor." Accord: Williams v. Runnels, 432 F.3d 1102, 1106, n. 7 (9th Cir. 2006).

Speculation, after the fact, on appeal, as to possible justifications is similarly improper. Under Batson, once a prima facie case has been established, "the prosecutor must articulate a neutral explanation." Batson, 476 U. S. at 98 (emphasis added). He must do so personally in open court. *A fortiori* a court cannot itself assume the prosecution's burden and hypothesize or speculate after the fact upon possible explanatory motivations. Johnson v. California, supra; Paulino I, supra.

Rehearing en banc is warranted, because the majority opinion is totally and wrongly based upon improper speculation, as follows:

(a) Juror Lawrence Martinez

Martinez was a disabled, former interstate truck driver. He was married, with five grown children. He spoke very little Spanish. If Spanish testimony was not interpreted accurately, he would tell the court. He could vote for the death penalty, or for life without parole (LWOP). (ER:III:819-823, 844-849)

The majority speculated that, because Martinez was a disabled truck driver, his disability, whatever it was, would have interfered with jury service. (maj. op., 18725) This speculation was improper. Johnson v. California, supra. It was also unsupported by the record. Martinez was passed for cause. There was no evidence of his specific disability. If it were an injured shoulder or arm, which prevented him from unloading trucks, that would not interfere with jury service.

Martinez could drive from his home in Delano to Bakersfield (25-30 miles), through heavy traffic, without difficulty. (ER:III:822) He did so to attend voir dire. If he could sit that much, he surely could sit as a juror.

A reason for a challenge, such as an undescribed disability, may not be deemed race-neutral if, as here, there is no evidence of it in the record. McClain v. Prunty, 217 F.3d 1209, 1221 (9th Cir. 2000) (prosecutor claimed he challenged black juror, because she said she mistrusted the system, but record lacked any such statement); Johnson v. Vasquez, 3 F.3d 1327, 1330 (9th Cir. 1993) (prosecutor claimed he challenged juror because she worked for defense attorney, but record lacked such evidence.)

In addition, seated juror Marshall Allen, a white male, lived even further away (36 miles) from the courthouse than Martinez. He said driving back and

forth would "cause a problem," but he could do it. (ER:III:816) Nonetheless, the prosecutor accepted Allen. "If a prosecutor's proffered reason for striking a [minority] panelist applies just as well to an otherwise-similar non-[minority], who is permitted to serve, this is evidence tending to prove purposeful discrimination. . . ." Miller-El v. Dretke, 545 U.S. at 241; Snyder v. Louisiana, supra.

Further, the prosecutor never asked Martinez to describe his disability, or if it would prevent sitting. If a prosecutor challenges a juror for a factor on which he asked no questions, that tends to establish pretext. Miller-El v. Dretke, supra, 545 U.S. at 246; Green v. Lamarque, 532 F.3d 1028, 1031-1033 (9th Cir. 2008).

The majority speculated Martinez exhibited body language making him seem unsuitable. (maj. op., 18725) Such speculation is improper. Johnson v. California, Paulino I. Further, because this speculation is unsupported by the record, it may not be accepted. Snyder v. Louisiana, supra; McClain v. Prunty, supra.

Finally, the majority takes speculation to a whole new level. It suggests the prosecutor challenged Martinez because "the prosecutor wanted to ingratiate himself with the remaining jurors by relieving the disabled Martinez from sitting on a long jury trial." (id., 18725) Under this speculation, prosecutors could cleanse juries of all disabled or minority people to make the remaining jurors feel good. This suggestion is beyond the pale.

Thus, there was no valid race-neutral reason on the record for the challenge to Martinez.

(b) Juror Maria Carrillo

Ms. Carrillo was a housewife with three children. Her son was arrested

once, as a juvenile. She did not blame the police. "Some other guys were stealing and he was caught." Her son may have been taking drugs. She was against drugs. She could vote for either the death penalty or LWOP. (ER:III:824-829, 851-855) On this record, there was no race-neutral reason for her challenge.

Respondent argued below, and the district court ruled, that there were two possible race-neutral reasons, her son's arrest, and the prosecutor's supposed "doubts about her ability to vote for the death penalty." (ER:I:95) Appellant disagrees.

(i) A challenge because of her son's arrest would be pretextual. The prosecutor accepted two white female jurors whose sons had equivalent, or worse, legal problems.

Lois Costello, Juror #8, said her son and nephew had both been on drugs. Her son had been in state prison for theft and drug possession. (ER:III:856-859) Notwithstanding her son's criminal history, the prosecutor accepted her.

Zelma Roux, Juror #4, had several adult children. One "just got out of" jail, for breaking a court order. (ER:III:860) The prosecutor accepted her, too.

If a prosecutor challenges a minority juror for a claimed reason (child was arrested), but retains a white juror - - indeed, two white jurors - - with that same reason, that establishes pretext. Snyder v. Louisiana, supra; Green v. Lamarque, supra, 532 F.3d at 1031-1033.

(ii) A challenge to Ms. Carrillo because of her supposed inability to vote for the death penalty would similarly have been pretextual. (See ER:III:825)

> Q [prosecutor Vendrasco]: What I'm trying to get at, would you consider that as a possible decision? Are you capable of deciding whether someone should get the death penalty under certain circumstances?
>
> A [Ms. Carrillo]: Yeah

> Q: You are not totally against the death penalty, are you?
>
> A: No.
>
> Q: You do think there are some murders that are so aggravated that that would be a good choice?
>
> A: Uh-huh. (ER:III:828-829)

Nothing here raised doubt about her ability to vote for death. When a reason is unsupported by the record, it is deemed pretextual. Johnson v. Vasquez, supra.

The majority abandoned these claimed reasons, implicitly conceding they were unsupported and/or pretextual. Instead, the majority invented its own reason. It speculated defense counsel did not want her because she was "not totally against the death penalty." (maj. op., 18724) However, counsel said no such thing. An opinion may not utilize such rank speculation. Johnson v. California; Paulino I.

Further, this speculation was baseless. Two Hispanics sat on this jury. Each said he could vote for death. (RT:voir dire:II:263-264; 407, 411). Defense counsel did not challenge them. Defense counsel moved pre-trial to ensure the jury panel contained a sufficient number of Hispanics. (RT:I:2-8, 222-223) Defense counsel did not challenge any Hispanic juror. (ER:III:748)[3]

According to the majority's newly-invented theory, reasonable defense counsel would never object under Batson when a prosecutor perempted minority jurors who support the death penalty. According to this theory, defense counsel would always challenge minority jurors who supported the death penalty, even if they would be replaced by white pro-death jurors. This newly-invented theory has multiple defects. First, it contravenes reality.

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[3]If the Court needs additional evidence whether defense counsel wanted the other Hispanic jurors retained, it could remand for an evidentiary hearing.

Second, defense counsel did not challenge the two remaining pro-death Hispanic jurors. Third, in a capital case, prosecutors will always challenge any juror - - white or minority - - opposed to the death penalty. Thus, under the majority's theory - - a variation of the damned-if-you-do-and-damned-if-you-don't-principle - - no minority juror would ever serve in a capital case, because he either opposes the death penalty (and would be challenged by the prosecution), or supports the death penalty (and would be challenged by the defense). An opinion presenting this theory cannot be allowed to stand. It disrespects the equal protection clause, and undermines Batson.

(c) Juror Alice Hernandez

Ms. Hernandez worked for the probation department as a "group counselor housekeeper" in juvenile hall. She never heard of this case or the defendants. (ER:III:880) She believed in the death penalty, and could vote for it. She could also vote for LWOP. (ER:III:873-881, 886-888) There was no race-neutral reason for her challenge.

Respondent and the district court asserted there was a race-neutral reason for her challenge, because she worked as a "group counselor housekeeper" at juvenile hall, where co-defendant Ruiz, but not Appellant, was housed. (ER:I:96) That is baseless for several reasons.

(i) Ms. Hernandez was not a counselor. (ER:III:880) She was a janitor, as was her husband. (ER:III:886) Accordingly, this claimed reason was pretextual, because it was unsupported by the record. McClain v. Prunty, supra.

(ii) No one explained why juvenile hall janitors would be biased toward adult defendants. Appellant's position was adverse to juvenile Ruiz on several

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key points, including who stabbed the male victim.[4] If Ms. Hernandez was likely to favor the juvenile, because she cleaned his dormitory, that would make her a pro-prosecution juror at Appellant's trial. Challenging a juror for a reason tending to make her pro-prosecution would be "implausible." Purkett v. Elem, 514 U.S. 765, 768 (1995).

(iii) Finally, if the prosecutor were concerned about her employment, he should have inquired, but he did not. (ER:III:873-881, 886-888) If a prosecutor challenges a juror for a factor on which he asked no questions, that tends to establish pretext. Miller-El v. Dretke, supra at 255; Green v. Lamarque, supra.

The majority abandoned Respondent's and the district court's speculative claims based on Ms. Hernandez's occupation, implicitly finding such reasons unsupported and/or pretextual. (maj. op., 18723) Instead, the majority replaced their speculation with its own speculation. Again, as with Ms. Carrillo, it speculated defense counsel may not have wanted Ms. Hernandez because she favored the death penalty. (maj. op., 18723) This claim is both speculative and specious. No reasonable defense counsel would challenge an otherwise acceptable pro-death minority juror of the defendant's race, with the likely result that she would be replaced by a pro-death white juror.[5]

This is especially true here. Defense counsel showed concern about the

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[4]The district court granted habeas relief on special circumstances for prosecution misconduct and witness perjury on the topic, *inter alia,* of whether it was Appellant or co-defendant Ruiz who stabbed Mr. Hayes. (See p. 7, *supra*)

[5]Every seated juror was pro-death penalty: Young (RT:voir dire:II:413); Sherill (RT:voir dire:V:914-915); Chavez (RT:voir dire:II:263-264); Roux (RT:voir dire:III:594); Urea (RT:voir dire:II:407, 411); Brouckaert (RT:voir dire:V:938-939); Allen (II:436); Costello (II:279); Yale (V:994); Taylor (V:919); Felli (IV:871-872); Mara (II:379-380).

number of Hispanics in the jury pool. 75% of the Hispanics passed for cause were excluded by the prosecution. Ensuring minority jurors serve is an important defense goal. They may understand the defendant's perspective or life experience and weigh evidence differently than white jurors. See, e.g., People v. Wilson, 44 Cal.4th 758, 831, 187 P.3d 1041 (2008).

(4) Differential questioning

When a prosecutor asks race-based questions solely of minority jurors, and then challenges them, that supplies evidence of racial animus. Miller-El v. Dretke, supra, 545 U.S. at 255. Prosecutor Vendrasco employed such differential questioning. (a) He asked Martinez, "if it turns out the defendant is of Spanish descent, would that cause you any problems in reference to whether you convict him of murder and impose the death penalty?" Martinez answered "No." (ER:III:822) (b) The prosecutor asked Carrillo, "And do you understand that race or nationality of the defendant, whether he is Mexican or anything other, is of really no significance in the trial. Do you understand that?" She answered, "Uh-huh." The prosecutor peremptorily challenged both. (ER:III:843, 862, 865)

Mr. Vendrasco did not question in this fashion the white jurors whom he accepted. This differential questioning of minority jurors and white jurors constitutes evidence of a Batson violation. Miller-El v. Dretke, supra.

(5) Other grounds for rehearing en banc

(a) The majority suggested that, to succeed on an IAC/ Batson argument, the defense needs testimony from an expert who personally observed the voir dire and the jurors' demeanor. (maj. op., 18729) Under this theory, no defendant could prevail on an IAC/Batson argument, unless there was a court-appointed monitor, observing the jurors. This suggestion is impossible as a matter of practicality. It was not the law when this case was tried. It violates the

Supreme Court's holding in Snyder v. Louisiana that minority jurors' demeanor may not be relied upon to support a challenge, unless a proper record is made.

(b) Finally, the majority stated if a Wheeler/Batson motion is based on the prosecution's disproportionate challenges against minority jurors, or is based on statistical evidence of discrimination, it should be disfavored, because that approach "reinforces the very racial stereotypes that Wheeler and Batson were meant to prevent." (maj. op., 18730) This contention effectively suggested that Wheeler/Batson motions should be barred. This contention - - and, indeed, the entire majority opinion - - directly undermines the equal protection clause and 25 years of Wheeler/Batson jurisprudence.

For all these reasons, rehearing en banc is warranted.

DATE: November 1, 2011

Respectfully submitted,

/s/ Stephen B. Bedrick
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CERTIFICATE OF COMPLIANCE
FRAP 32(a)(7)(c) and 9th Circ. Rule 32-1

I certify that this brief is proportionately spaced, has a typeface of 14 points or more, and according to my computer's word count contains 4,186 words.

DATE: November 1, 2011

Respectfully submitted,

/s/ Stephen B. Bedrick
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PROOF OF SERVICE BY MAIL

I, Lester Schonbrun, hereby declare under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 1970 Broadway, Suite 1200, Oakland, CA 94612.

On the date below, I served the following documents:

PETITION FOR REHEARING AND/OR REHEARING EN BANC

by placing a true copy thereof, enclosed in a sealed envelope, postage prepaid, in the United States mail addressed as follows:

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DATED: November 1, 2011

s/ Lester Schonbrun
LESTER SCHONBRUN

APPENDIX A

08-99007

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONSTANTINO CARRERA,

Petitioner and Appellant,

v.

ROBERT L. AYERS, Jr., Warden,

Respondent and Appellee.

On Appeal from the United States District Court
for the Eastern District of California

No. 1:90-CV-00478 AWI
The Honorable Anthony W. Ishii, Judge

RESPONSE TO PETITION FOR REHEARING EN BANC

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STATUTES

I. THE PANEL MAJORITY CORRECTLY DETERMINED THAT PETITIONER FAILED TO MEET HIS BURDEN TO DEMONSTRATE DEFICIENT PERFORMANCE

The panel majority determined that petitioner failed to meet his burden of demonstrating that, in failing to object to the prosecutor's challenges to Hispanic jurors, counsel rendered deficient performance. The majority's decision was entirely correct.

A. Background

Prior to jury selection at petitioner's 1983 trial, defense counsel made a motion to ensure that the number of Hispanics in the jury venire was proportional to their percentage in the county population, which she stated was 15-18%. (RT I 2-8.) After the first panel of 60 jurors appeared, trial counsel stated that she was satisfied with the number of Hispanics jurors in that panel. She counted at least 11 Hispanic jurors and the trial court indicated there may be at least 14. Trial counsel then withdrew any objection to that panel. (RT II 232-233.) She also did not object to the racial make-up of the second panel. (RT II 522-524.)

During the actual jury selection process, the prosecutor peremptorily challenged six of eight Hispanic jurors who were seated in the jury box. Petitioner was a 22-year-old Hispanic male. The victims were white. Ultimately, there were two Hispanic men seated on petitioner's jury and one

Hispanic female served as an alternate. The two Hispanic jurors were seated early in the process. One was seated in seat number three and the other in seat number five. Defense counsel did not challenge the jury.

Subsequently, defense counsel filed a 1988 declaration concerning her failure to make a motion stating:

> I have read the list of jurors with Hispanic surnames that the prosecutor excused by way of peremptory challenge, and still see no need to make a Wheeler motion in this case. While I cannot now recall my reasons for any other jurors, I do know that I could not make a Wheeler motion in regard to the prosecutor's excusal of potential juror Estrada. He was my letter carrier.

(Exh. G, p. 12, to Resp. State Habeas Return.)

The prosecutor filed a declaration stating that he could not remember his reasons for challenging five of the six Hispanic jurors, but that he did have race neutral reasons. He challenged the sixth, Mr. Estrada, because he was defense counsel's letter carrier. (ER I: 74.)

Petitioner claimed that counsel's failure to move to dismiss the entire jury panel for racial discrimination in jury selection constituted ineffective assistance of counsel. The panel majority denied this claim. The majority held that petitioner had failed to satisfy his burden of proving that counsel rendered deficient performance. (maj. op., 18732.)

First, the majority noted that *Batson v. Kentucky*,476 U.S. 79 (1986), was not the proper standard on which to measure counsel's performance. Rather, *People v. Wheeler*, 583 P.2d 748 (Cal. 1978) was the applicable law dealing with racial discrimination in jury selection at the time of petitioner's trial. (maj. op., 18717-18718.)

Second, the majority stated that the issue before it was not whether counsel would have succeeded had she made a *Wheeler* motion, but rather whether reasonable counsel might have declined to make a *Wheeler* motion under the circumstances. (maj. op., 18719.) The majority then answered that question in the affirmative. In doing so, the majority reviewed the voir dire transcript and found race neutral reasons why each of the six Hispanic jurors might have been stricken. From that, the majority concluded that petitioner could not show that trial counsel was deficient in failing to make a *Wheeler* motion. (maj. op., 18720-18725.) The majority also noted that separate and apart from any evidence of racial bias, counsel may have liked the jury that ultimately was picked: "[T]here are many reasons why defense counsel may have supported the removal of Hispanics struck by the prosecutor. Indeed, defense counsel may have been pleased with the resulting jury, despite the fact that the prosecutor had removed several Hispanic venirepersons." (maj. op., 18729.)

The majority concluded that petitioner had not overcome the strong presumption that counsel's decision not to challenge the panel was strategic.

Judge Tashima dissented. He concluded that counsel's failure to make a *Wheeler* motion was objectively unreasonable and prejudice must be presumed from such error. Judge Tashima would have granted the writ. (dissent, 18733.)

B. The Majority Decision Was Correct – Petitioner Has Not Met His Burden To Show Deficient Performance

It is axiomatic that it is petitioner who bears the heavy burden of demonstrating that counsel's failure amounted to deficient performance. As was recently stated by the Supreme Court:

> To establish deficient performance, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness. A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance. The challenger's burden is to show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment…
>
> An ineffective-assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under de novo review, the standard for

> judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of material outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second guess counsel's assistance after conviction or adverse sentence. The question is whether an attorney's representation amounted to incompetence under prevailing professional norms not whether it deviated from best practices or most common custom.

Harrington v. Richter 131 S.Ct. 770, 787-88 (2011) (internal quotations and citations omitted).

Using this highly deferential analysis, it is clear that petitioner has not met his heavy burden of establishing deficient performance.

First, it must be remembered that petitioner's jury selection occurred in 1983, long before it was clear to defense counsel how to respond to perceived racial discrimination in the jury selection process. The fact that the law in this area was unsettled in California in 1983 is evidenced by the fact that, as late as 1987, California courts suggested that leaving two or more members of the stricken cognizable group on the panel would, by itself, defeat a motion that the prosecutor was impermissibly using race as a basis to strike jurors. See *People v. Davis*, 189 Cal.App 3d 177, 1191 (1987) (quoting *People v. Boyde*, 167 Cal. App. 3d 36, 47 (1985), *overruled by People v. Snow*, 44 Cal.3d 216, 225-226 (1987)). While it is true that this

was not the law at the time of petitioner's trial in 1983, the fact that courts sanctioned it shortly after petitioner's trial shows that the issue was not settled at the time of jury selection in petitioner's case. It was not until 1987, in *People v. Snow*, that California law was clarified so that competent counsel would know that passing some minority jurors may show non-discriminatory purpose on the part of the prosecutor but it was not conclusive on the issue as the *Boyde* and *Davis* courts had erroneously held. See *People v. Snow* 44 Cal.3d at 226.

Thus, it would be fair to say that at the time of petitioner's trial in 1983, the idea that any inkling of race base challenges by the prosecutor should be met with a motion to dismiss the panel would be to unfairly and improperly examine petitioner's jury selection with "the distorting effects of hindsight." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). This is especially true here when two Hispanic jurors were seated early in the jury selection process, presumably before any defense attorney might become suspicious of repeated challenges to Hispanic jurors. Thus, given the state of the law, unsettled as it apparently was in 1983, petitioner has not shown that reasonably competent counsel would certainly have determined to make a *Wheeler* motion to dismiss this jury. See *Turner v. Calderon*, 281 F.3d 851, 877 (9th Cir. 2002).

Second, separate and apart from the ambiguous state of the law, as the panel majority concluded, there were reasons in the record that demonstrated that possible race neutral explanations existed for the prosecutor's challengers. One must remember, as the majority correctly noted (maj. op., 18729), that the issue is not whether the prosecutor, in fact, had race neutral reasons, but whether reasonably competent counsel could have concluded that she might have had such reasons and therefore declined to make a *Wheeler* motion. In this respect, the dissent is simply wrong to state that only the real reasons the prosecutor gave for his challenges are relevant. (dissent, 18735.) That may be true for a direct claim of racial discrimination in jury selection, see *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004), but this is not a direct claim of racial discrimination in jury selection. Rather, this is a collateral ineffective-assistance-of-counsel claim which requires that one consider the possible reasons that counsel failed to make a motion. If the record reflects race neutral reasons existed for each challenge, then reasonably competent counsel might not have made a *Wheeler* motion. See *Morris v. State of California*, 966 F.2d 448, 456-57 (9th Cir. 1992)

The panel majority laid out plausible reasons that may have caused trial counsel to conclude that a *Wheeler* motion as to each of the challenged jurors may have been futile based on the record. (maj. op., 18720-18725.)

Respondent will not repeat such evidence here. However, the idea advanced by the dissent that the majority is simply making up reasons (dissent, 18735) is refuted by trial counsel's declaration. In her declaration, she clearly implies that she had reasons as to why she did not challenge the prosecutor's striking of Hispanic jurors. She stated that she "cannot now recall" her reasons. This, as the majority correctly concluded, suggests (maj. op., 18730, n. 17) that she did have reasons five years earlier, but simply cannot recall those reasons due to the passage of time. This conclusion is further supported by her statement that she could remember the reason why she did not make a motion as to the prosecutor's challenge to Mr. Estrada because he was her letter carrier. In light of the fact that trial counsel's declaration implies that reasons did exist, it was perfectly appropriate for the majority to look in the record to see what those reasons might have been. Moreover, it is petitioner's burden to show that no good reasons justified counsel's inaction. Respondent does not have to justify counsel's failure to act. See *Richter v. Hickman*, 521 F.3d 1222, 1233 (9th Cir. 2008); *Romine v. Head*, 253 F.3d 1349, 1357-1358 (11th Cir. 2001).

Third, even if no reasons existed in the record to dispel an inference of racial discrimination in the prosecutor's challenges, that is not enough to meet petitioner's heavy burden of showing that no reasonably competent

attorney would have declined to challenge this jury. The only way petitioner can meet his burden in such a case is by implying that, by accepting a jury with less Hispanics than she might have gotten, counsel rendered deficient performance. This is what the dissent concludes to be true. (dissent, 18738.) But, as the majority points out (maj. op., 18730), by so concluding, the dissent itself engages in impermissible racial stereotyping. Further, trial counsel's job is to protect the interests of her client. She is not supposed to be interested in the Equal Protection rights of the jury panel nor in society at large's interest in having a representative jury. Petitioner's burden is to show what tactical advantage would have been gained at his trial by making a motion to strike the jury panel and start over? The dissent simply misses this point. Its argument, adopted by petitioner, is simply that racial discrimination is bad and since there may have been racial discrimination here, counsel should have objected and possibly tried to obtain a new panel. But that is more speculation than anything the majority engages in. There is simply no basis to assume a tactical benefit to petitioner from such a motion.

Moreover, trial counsel had a jury with two seated Hispanic jurors. Thus, she knew that this jury at worst would contain two Hispanic jurors or, in other words, 16.6% of the jury, would be Hispanic. In her pretrial motion to ensure a representitive venire, counsel appeared to be hoping for between

15-18% of Hispanics on the venire. She was obviously concerned with ensuring that there were Hispanics on the jury in some proportion relative to their representation in the general population. Had she not achieved this objective? The fact is that counsel could have reasonably and competently determined that she had achieved her goal of ensuring that there were Hispanic jurors on petitioner's jury in a percentage similar to their population in the county and therefore moving to dismiss the jury would not be in the best interests of her client. That ends the *Strickland* inquiry. After all, the relevant question is not what counsel could have pursued, but whether the choices that counsel made were reasonable. *Turner v. Calderon*, 281 F.3d at 877.

When one views counsel's decision under the highly deferential prism required by *Strickland*, the majority's decision is entirely correct.

II. ASSUMING ARGUENDO, COUNSEL RENDERED DEFICIENT PERFORMANCE, PETITIONER MUST SHOW PREJUDICE, WHICH HE HAS NOT DONE

This Court has never decided whether ineffective assistance of counsel that results in a structural error requires proof of prejudice, or as the dissent here asserts, prejudice must be presumed. Likewise the United States Supreme Court has not decided this issue. Other Circuits are split. *Compare Johnson v. Sherry,* 586 F.3d 439, 446 (6th Cir. 2009) (prejudice would be

presumed where ineffectiveness resulted in structural error); *Owens v. United States*, 483 F.3d 48, 64 n.14 (1st Cir. 2007) (same), *with Purvis v. Crosby*, 451 F.3d 734, 742 (11 th Cir. 2006) (requiring a showing of actual prejudice where counsels failure led to structural error), *and with Virgil v. Dretke*, 446 F.3d 598, 607 (5th Cir. 2006) (same).

Respondent submits that the better argument is that prejudice must be shown. That is, petitioner must show that the result of his trial would have been different.

The Supreme Court has carefully identified three limited situations in which *Strickland* prejudice could be presumed. These dealt with actual denial of counsel, constructive denial of counsel, and conflicts of interest on the part of counsel. *Bell v. Cone*, 533 U.S. 685, 695 (2002). In these circumstances, "prejudice is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692. Noticeably absent from these enumerated situations is any notion that counsel's failure to protect certain fundamental rights could result in bypassing the standard *Strickland* prejudice analysis.

The latest pronouncement from the High Court in this area supports the above position. In *Francis v. Henderson*, 425 U.S. 536, 542 (1976), the court held that a showing of actual prejudice was required to overcome a

procedural bar arising from a failure to object to structural error at trial despite the fact that had the right been asserted in a timely manner at trial a presumption of prejudice may have arisen. Nothing in *Strickland* or in *Batson*, or any other subsequent "structural error" cases, undermines the ruling in *Henderson*.

It is easy to understand the distinction made in *Henderson*. Some constitutional rights, if asserted in a timely manner, are given to the defendant but are really designed to vindicate societal interests. The right to a public trial may not benefit the defendant on trial, but we as a society are better off and our system of justice will be fairer and better by having public trials. So too, the right to have a jury selected without use of racial bias. In such cases, we presume prejudice for the denial of these rights when they are objected to, despite the fact that there may be no evidence that the defendant suffered as a result of the error. *See Freytag v. Comm'r*, 501 U.S. 868, 896 (1991) (Scalia J., concurring) Thus, although in a particular case a defendant may receive what amounts to a windfall, any unfairness from such a windfall yields to the greater good.

However, when a claim is made that an attorney failed to object to a so-called structural violation, the right at stake is not a societal one, but rather the defendant's right to effective assistance of counsel. The right to counsel

is, of course, designed to ensure that the defendant gets a fair trial not a perfect one. *See Lutwak v. United States*, 344 U.S. 604, 619 (1953). Thus, it makes sense to require the defendant to show that counsel's error impacted the outcome of his trial. This is true whether the attorney's failings resulted in trial error or structural error. Understandably, in situations where counsel has not performed at all or has performed with some great conflict of interest, courts presume prejudice because prejudice to the defendant's right to a fair trial is so great. *Strickland*, 466 U.S. at 692. But, that is not true where counsel is present and working on behalf of the defendant, but simply fails to object to the denial of one of his constitutional rights. This error may have had little or no impact on the outcome of the proceeding and, thus, no impact on the perceived fairness of the trial. In such a situation it makes no sense to say that, in order to vindicate a defendant's right to a fair trial, we should presume prejudice because the right counsel failed to protect was particularly important.

Moreover, the requirement that actual prejudice be shown for failure to object to structural error makes sense from a policy standpoint. Otherwise what is to prevent a clever defense attorney from guaranteeing his client two bites at the apple by failing to object to the closing of a courtroom or racial improprieties in jury selection knowing that, if the defendant is convicted he

can fall on his sword and get his client a second trial. Requiring proof that the error impacted the outcome eliminates that possibility.

Here, petitioner has not shown, nor can he show, proof that he was actually prejudiced by counsel's failure to object to the prosecutor's alleged use of race to challenge Hispanic jurors. Thus, his claim must fail.

III. PETITIONER'S CLAIM IS *TEAGUE* BARRED

Under *Teague v. Lane*, 489 U.S. 288, 299 (1989), a "new rule" of federal constitutional law will not be applied or announced on collateral review unless the rule falls within one of two narrow exceptions. *Teague* is analyzed following a three step approach: determining the date of fnality; ascertaining whether the rule is "new"; and deciding whether either of the two *Teague* exceptions applies. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Generally speaking, a rule that is not "clearly established" for purposes of § 2254(d)(1) underTitle 28 of the United States Code, will constitute a "new rule" under *Teague*. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Ponce v. Felker*, 606 F.3d 596, 604 (9th Cir. 2010). Although not raised in the District Court, this court has discretion to address a *Teague* defense even though raised for the first time on rehearing. *Garceau v. Woodford*, 281 F.3d 919, 920 (9th Cir. 2002).

As of the date of finality, February 15, 1990, it was not clearly established that prejudice is presumed where, as here, the defendant brings a claim of ineffective assistance based on a *Batson* violation. See *supra* at p. 11 (citing cases); see also *Winston v. Boatwright*, 649 F.3d 618, 633 (7th Cir. 2011)

In light of this absence of clearly established law, Petitioner's ineffective assistance claim based on presumed prejudice constitutes a new rule of law under *Teague*. Because neither of the two exceptions to *Teague* appies, Petitioner is barred from obtaining relief. *Teague*, 489 U.S. at 288.

For the reasons stated above, this Court should deny the petition for rehearing en banc.

Dated: January 10, 2012

Respectfully submitted,

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FOR 08-99007

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January 10, 2012
Dated

S/ Clifford E. Zall
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